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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RENIE JOSE ARIAS, Defendant and Appellant.	A132893 (Contra Costa County Super. Ct. No. 906842)

Defendant Renie Jose Arias was sentenced to state prison for a term of 25 years to life after a jury found him guilty of first degree felony murder and robbery. Defendant's primary contention is that the trial court abused its discretion by denying his motion for advisory counsel to assist him while he represented himself at trial. He further contends that a concurrent term for his robbery conviction must be stayed pursuant to Penal Code section 654 and that the booking fee imposed at sentencing pursuant to Government Code section 29550.2 must be stricken because there is no substantial evidence establishing his ability to pay. We conclude that only defendant's second claim is sound. Thus, we affirm the judgment as so modified.

BACKGROUND

Because defendant does not challenge the sufficiency of the evidence to support his convictions, and because the contentions he advances on this appeal are not dependent on the trial record, only a brief description of the crimes is necessary.

It appears that the victim, Kenic Echeverria, was something like the neighborhood fence. He also seems to have had a problem keeping his car from being impounded.

Both of these circumstances caused him to have the reputation of carrying large sums of money on his person. David Hernandez and defendant, both of whom had sold stolen property to Echeverria, decided to rob him. Defendant believed there was no plan to kill Echeverria. But on May 19, 2008, as soon as Hernandez and defendant were alone with Echeverria, Hernandez shot him. Money was taken from the victim and split between Hernandez and defendant, who also took his car.

The information against defendant was filed in July 2009. In December of the following year, defendant moved to have the public defender relieved as his counsel and to represent himself as permitted by *Faretta v. California* (1975) 422 U.S. 806. The motion was granted.

In January 2011, defendant submitted handwritten motions for "court appointed legal runner" and "court appointed investigator." Both motions were granted. Defendant thereafter peppered the court with his motions, some of which were granted, some not.

In May of 2011, defendant submitted two motions to have a specific private counsel, Joseph M. Tully, appointed to defend him. The motions were heard on May 9, one week before the set trial date. The court granted the motion insofar as defendant was seeking to have counsel appointed, but denied it by refusing to appoint Mr. Tully. The court was explicit about what this entailed:

"Mr. Arias, I'm going to deny your request to appoint a particular attorney. I will refer you back to the public defender's office. If they conflict, then it might go to the alternate defender or it might go to the conflicts panel and you may or may not, if they conflict, get Mr. Tully. But I'm not going to directly appoint Mr. Tully."

The prosecutor made the same point: "You understand, sir, that you're going to get referred back to the public defender's and in all likelihood you could get the same attorney [i.e., the same individual who represented defendant before he elected to represent himself]. We can't guarantee that. Knowing that, do you still wish to have counsel appointed or do you wish to continue representing yourself?

"THE DEFENDANT: I wish to have counsel appointed."

The prosecutor then inquired "if the court's going to vacate the jury trial on the 16th." The court responded "I do not intend to vacate it today."

Three days later, on Thursday, May 12, four days before the trial date, defendant filed a "Motion For Advisory and/or Standby Counsel," again specifying his desire for Mr. Tully. A public defender advised the court that "We're prepared to accept Mr. Arias' case back, and what I'd like to do is put this over to-set on May 25 . . . if that's acceptable." The prosecutor was agreeable, but he noted "I do think that we have to address Mr. Arias' latest motion which is a motion for advisory counsel."

The court inquired of defendant, "I assume you're asking that the public defender be appointed as advisory counsel as opposed to your counsel for all purposes?" Defendant replied: "Yes, if I don't get Mr. Tully. I was under the impression that the Public Defenders Alternate won't do an advisory." After the public defender confirmed "That is correct," the court stated: "I do not find good cause in this matter to grant advisory counsel. It is within my discretion. [¶] So you choice is you earlier confirmed the trial for . . . the 16th. So do you want to go to trial on Monday, or do you want to be referred to the Public Defender for them to represent you as counsel of record?"

At this point the prosecutor spoke up:

"MR. GROVE: Judge, could I interpose here for a second? . . . [¶] I did happen to do some research on the advisory counsel issue and it is within the court's discretion but I do believe that there are a number of factors which weigh for the court denying his request for advisory counsel including his extensive rap sheet with numerous contacts with the criminal justice system, his demonstration of ability to understand the legal system as evidenced by his numerous discovery motions, continuance motions and appointment of counsel motions. He has credibly, lucidly discussed the case both on the record and off the record and I also think there's evidence he's manipulating the system here as he is asking for Mr. Tully to be the advisory counsel after it was denied that Mr. Tully would be appointed counsel. With that, I'm prepared to proceed.

"THE COURT: All right, I do accept all of Mr. Grove's arguments; I concur with him for the record. [¶] So, Mr. Arias, do you want the public defender to be your counsel

of record? They have accepted. [¶] Or do you wish to proceed to trial in pro per? [¶] I will not grant a motion for advisory counsel.

"THE DEFENDANT: There's no way I can get an advisory?

"THE COURT: I denied that motion.

"THE DEFENDANT: I feel like I can represent myself better in trial better with an advisory that way I can speak my mind.

"THE COURT: I heard you and read your motion and your motion is denied."

After discussing another matter, the court again asked defendant: "Do you wish to proceed to trial next week in pro per, or do you wish to be represented by the public defender as counsel of record? [¶] . . . [¶] Mr. Arias, you should be aware that once the trial date has arrived, it is within the complete discretion of the trial court whether to allow you to then literally on the eve of trial ask for a lawyer. So if you decide today to go forward in pro per status, it may be to your peril if you decide to change your mind next week so I will ask you to very carefully consider do you want me to appoint the public defender to represent you, and they're willing to accept you today, or do you wish to proceed to trial on Monday, the 16th, representing yourself?" Defendant elected to "Proceed to trial."

At the start of trial proceedings on May 16, the trial court confirmed with defendant "that it is your desire to . . . represent yourself."

REVIEW

The Trial Court Did Not Abuse Its Discretion By Denying Defendant's Motion For Advisory Counsel

"[A] defendant has no right, under either the federal or state Constitution, to 'hybrid representation.' Criminal defendants have the constitutional right to have an attorney represent them, and the right under the federal Constitution to represent themselves, but these rights are mutually exclusive . . .. [¶] Although there is no constitutional right to hybrid representation, we have long recognized that the trial courts retain the discretion to permit the sharing of responsibilities between a defendant and a

defense attorney when the interests of justice support such an arrangement. [Citation.] Defendant contends the trial court's decision not to appoint [advisory] cocounsel in this case was an abuse of the court's discretion. . . . [R]egarding a challenge to the denial of hybrid representation, 'as with other matters requiring the exercise of discretion, "as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside . . . . [Citations.]" ' " (*People v. Moore* (2011) 51 Cal.4th 1104, 1119-1120, fn. omitted, quoting *People v. Clark* (1992) 3 Cal.4th 41, 111.)

"The factors which a court may consider in exercising its discretion on a motion for advisory counsel include the defendant's demonstrated legal abilities and the reasons for seeking appointment of advisory counsel. Where a defendant represented by the public defender has undertaken self-representation only after seeking appointment of private counsel and after having failed to demonstrate proper grounds for appointment of substitute counsel, a request to have private counsel appointed in an advisory capacity might evidence a manipulative endeavor to obtain the appointment of private counsel without a showing of conflict or inadequacy sufficient to remove the public defender in the first instance. Where the record supports an inference of such a manipulative purpose, a court might be justified in denying a request for advisory counsel." (*People v. Crandell* (1988) 46 Cal.3d 833, 863, disapproved on a different ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

And, of course, our review of the trial court's ruling is restricted to the record and information known to the trial court at the time it made that ruling. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 378, fn. 2.) One factor gives this principle particular force, namely, that it was the same judge, the Hon. Brian Haynes, who heard and ruled on all of defendant's motions prior to trial.

Setting to one side the special situation of death penalty cases, there is much force to the following comments about this situation: "It would seem that if a defendant who waives the assistance of counsel is competent to represent himself, he should do so, *by himself*; if he is not able to defend himself without the assistance of advisory counsel,

then he is not competent to represent himself." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1431.) There seems scant doubt that this thought was in Judge Haynes's head, for he had seen defendant represent himself for more than six months, with some measure of success, a point confirmed at the May 12 hearing.

By the time defendant made his motion for advisory counsel, it was clear that it was made with an unstated proviso—it was not the public defender, but Mr. Tully that defendant truly wanted. This was the third time that defendant sought to have Mr. Tully put at his side. And this was after the public defender had confirmed that he was not available to serve as advisory counsel. Thus, defendant was seeking for the third time to have Mr. Tully appointed as his counsel, albeit this time under the guise of being merely "advisory counsel." With an inflexible trial date, this smacks of manipulation, if not contumacy. If any doubt remained, it was dispelled when, on May 16, given the choice between the public defender or nothing, defendant reiterated that he wished to continue representing himself. We cannot conclude in these circumstances that the denial of defendant's motion for advisory counsel, when so intimately tied to Mr. Tully's appointment, can be condemned as an abuse of the trial court's discretion. (*People v. Moore*, *supra*, 51 Cal.4th 1104, 1120; *People v. Crandell*, *supra*, 46 Cal.3d 833, 863.)

Defendant's efforts to show otherwise are unavailing. He reasonably points to some of the factors cited by the prosecutor in his interjection after the court announced its ruling. However, not all of those factors cited by the prosecutor in general are applicable to defendant's situation in particular. Some of those factors are derived from *People v. Bigelow* (1984) 37 Cal.3d 731, 743-744, a capital case, and are therefore of marginal utility. Too, defendant tries to substantiate certain factors by citing to information without showing that it was actually known to the trial court. Thus, he points to his "poor educational background" by citing the probation report, but that was not compiled until long after the court's ruling. Defendant also minimizes his criminal history with reference to the probation report. Obviously this was not known to Judge Haynes at the time of his ruling. (*Haworth v. Superior Court*, *supra*, 50 Cal.4th 372, 379, fn. 2.)

Nor, realistically, can the trial court presiding over pretrial matters be faulted, as defendant implicitly does, for not anticipating "the factual and legal complexities of this case," certainly not to the extent of appreciating that the seriousness of the charges "virtually mandated advisory counsel to assist appellant with making proper objections, with cross-examination of witnesses, and with argument. Indeed, appellant cross-examined only three of the prosecution's twelve witness. And appellant called only one witness, his mother, who provided no useful defense evidence." All of these developments lay in the future and were unknown to the trial court. All of this cannot be used to overturn the trial court's decision. (*Haworth v. Superior Court*, *supra*, 50 Cal.4th 372, 379, fn. 2.)

Remaining Issues

Defendant was sentenced to the statutorily prescribed term of 25 years to life for the felony murder, and a concurrent term of three years for the robbery. Defendant contends that the robbery term must be stayed pursuant to Penal Code section 654 because, as the predicate felony, the robbery is one of the essential elements of the murder. Acknowledging that *People v. Meredith* (1981) 29 Cal.3d 682, 695-696, controls, the Attorney General concedes that defendant's point is well taken. The judgment will be modified accordingly.

"Any person booked into a county jail . . . is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs . . . incurred in booking or otherwise processing arrested persons." (Gov. Code, § 29550.2, subd. (a).) The trial court imposed a "booking fee" of $340. Citing *People v. Pacheco* (2010) 187 Cal.App.4th 1392, defendant contends this fee must be stricken because the court made no determination that defendant had the ability to pay this fee. The Attorney General responds that this point was not preserved for review because defendant did not make this objection when the fee was imposed.

We do not agree with *People v. Pacheco*, *supra*, 187 Cal.App.4th 1392 to the extent it holds that a booking fee cannot be lawfully imposed in the absence of evidence of the defendant's ability to pay, and that this omission may be raised for the first time on appeal. In *People v. Valtakis* (2003) 105 Cal.App.4th 1066, we concluded that a fee imposed pursuant to a provision similar to Government Code section 29550.2 could not be challenged for the first time on appeal on the ground that the defendant's ability to pay was not established at the time of sentencing. We continue to hold this view.

DISPOSITION

The judgment of conviction is modified to reflect that the sentence imposed on count two shall be stayed pursuant to Penal Code section 654, such stay to become permanent upon completion of the term on count one. As so modified, the judgment is affirmed. The clerk of the trial court is directed to prepare an amended abstract of judgment reflecting this modification, and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____
Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.